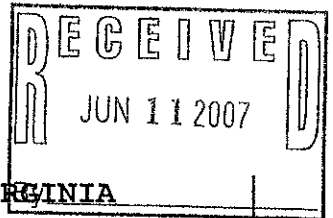


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IN THE FAMILY COURT OF NICHOLAS COUNTY, WEST VIRGINIA

IN RE: THE MARRIAGE OF:

SHIRLEY E. GROSE, Plaintiff,
and JOHN H. GROSE, Defendant

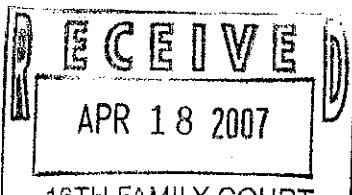
Civil Action No. 87-C-59

ORDER GRANTING JUDGMENT TO PLAINTIFF

On the 19th day of March, 2007, came the plaintiff, Shirley E. Grose, in person and by counsel, Harley E. Stollings, and came the defendant, John H. Grose, in person and by counsel, James Wilson Douglas, for a final hearing on the plaintiff's petition to require accounting and for entry of qualified domestic relations order.

From the record, there have previously been two status conference hearings on the said petition, the first on the 28th day of August, 2006, and the second on the 12th day of December, 2006. During both these hearings, the defendant introduced documents and presented argument in support of a motion to dismiss the plaintiff's petition, any ruling on which was held in abeyance pending further development of the record.

The second status conference order required the parties to depose a representative of the United Mine Workers of America 1974 Pension Fund. The parties have at this time stipulated that a letter from Rollin H. Marquis, special payments analyst with the UMWA Health and Retirement Funds, dated January 25, 2007 and the attachments thereto, copies of all of which have been made a



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part of the record, is sufficient information from the Fund and that no such deposition will be necessary. .

The Court hereby ORDERS that all documents and exhibits introduced by the parties during the prior proceedings herein shall be admitted into evidence and made a part of the record.

Upon which, the parties stipulated to certain facts and presented oral argument and citation of authority in support of their respective positions, the said stipulations of facts being as follows:

1. The parties were married on the 11th day of July, 1964 and separated on the 26th day of January, 1987.
2. The parties were divorced by the Court's bifurcated divorce decree entered on the 19th day of May, 1989, which reserved certain equitable distribution issues for later disposition.
3. By order dated the 17th day of April, 1990 and entered on the 8th day of August, 1990, the Court ordered:
 2. Any pension or retirement benefits which may be presently vested in the defendant, or which may in the future become vested in the defendant, are marital property to the extent that said benefits were earned or accrued during the period of time the parties were married to each other and living together, i.e. from the 11th day of July, 1964 to the 26th day of January, 1987. If and when any such benefits become vested in the defendant or collected by him, the plaintiff shall be entitled of a percentage of one-half of said benefits computed by applying a fraction in which the numerator is the amount of said benefits accrued during the time the parties were living together and in which the denominator is the total amount of benefits.
4. By letter from the UMWA Health and Retirement Funds dated

April 30, 1993, the defendant, John H. Grose, was awarded a "disability pension" effective from April 01, 1991. The said award letter was accompanied by back pay for the period between April 1, 1991 and the date of the award letter. The defendant has received checks from the 1974 Pension Plan each month since April 30, 1993.

5. The defendant's work credited to the Fund continued for some time after the entry of the divorce decree and terminated with an injury on ^{March 16,} ~~April 1,~~ 1991. 
6. The defendant's credited signatory service for the purposes of the pension calculation is for the period from January 1, 1967 through ^{March} ~~April 16,~~ 1991 and under the Fund's calculation method, totals 24.50 years.
7. The parties were married and co-habitated for a total of 20.07 years of the said period of credited signatory service, which for the Court's purposes is found to be 20 years.
8. At no time between April 30, 1993 and the date upon which the plaintiff's petition for accounting was filed did the defendant make any effort to notify the plaintiff he had begun receiving a disability pension. 
9. Plaintiff had no notice between April 30, 1993 and the date of the defendant's response to the petition for accounting that the defendant had begun drawing a disability pension. 

10. The defendant, John H. Grose, turned age 62 on January 21, 2003.

The Court further makes the following Findings of Fact:

11. The plaintiff asserts she filed her petition for accounting upon recognizing the defendant had reached the age of 65 and that she having surmised any UMWA pension to which he was entitled would surely have begun paying by that time. Such assertion by the plaintiff is accepted by the Court as true.
12. The exhibits of record include a Summary Plan Description of the UMWA 1974 Pension Plan which defines a disability pension as a type of pension paid to a mineworker who has been totally disabled by a mine accident which happened while he was working for a signatory employer. The Plan alternately pays either a "minimum disability pension" or a "disability pension", the difference being that a minimum disability pension is paid at the rate of \$230.00 per month and a disability pension is paid to a mineworker who has more than ten years of credited service at the onset of the disability. A disability pension is calculated in the same manner as is a "normal retirement pension".
13. A normal retirement pension is defined by the Fund as a type of pension paid to a mineworker who has satisfied the Plan's service requirements and retires on or after his 62nd birthday.

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14. The letter from the UMW Health and Retirement Funds dated January 25, 2007 states at page 2 "...a Disability Pension is a retirement pension...".
15. From the 1974 Pension Fund Plan Summary appears the following:
 - A. The disability pension being paid to Mr. Grose is paid from the same account as a normal retirement pension would be paid from.
 - B. The disability pension being paid to Mr. Grose would never be converted to a normal retirement pension unless for some reason he was found to no longer be totally disabled.
 - C. The disability pension being paid to Mr. Grose will be paid to him for so long as he lives.

Upon consideration of the argument of counsel, the authorities cited by the parties and by applying the same to the foregoing facts, the Court hereby makes the following Conclusions of Law:

1. The case of Staton v. Staton, 624 S.E.2d 548 (W. Va. 2005) holds "...that benefits that actually compensate for disability are separate property because such monies are personal to the spouse who receives them. In some cases, benefits will need to be separated into a retirement component and a true disability component, classifying the

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retirement component as marital property and the disability component as separate property." Staton, p. 553. Staton requires the distinction be based upon the "purpose" of the payments.

2. In the case of Conrad v. Conrad, 216 W. Va. 696, 612 S.E.2d 772 (2005), the Court noted that the determination of whether disability benefits are marital property must be done on a case by case basis according to the particular facts.
3. Under Footnote 6 of Staton, if a portion of the subject disability pension is found to be truly retirement benefits, Mr. Grose may not thwart Mrs. Grose's entitlement to receive those payments after Mr. Grose has met the age requirement for a normal retirement pension, i.e. age 62.
4. The disability pension being paid to Mr. Grose has both a disability component which is his separate property and a truly retirement component which is marital property.
5. The purpose of the disability component is to replace Mr. Grose's earning capacity resulting from the debilitating injury suffered by him on ~~April 1~~ ^{March 16,}, 1991 and runs through Mr. Grose's 62nd birthday, that being the date he could have drawn and received a normal retirement pension had he not suffered the debilitating injury.
6. The truly retirement component of the disability pension

being received by Mr. Grose is all those payments received by him after his 62nd birthday through the date hereof and all payment which he may be eligible to receive at any time hereafter.

7. Since 20 years of Mr. Grose's credited 24.5 years of service were credited during the period of the parties' marriage and co-habitation, the portion of the subject pension which is marital is computed as a fraction of the whole, which fraction is stated with the numerator as 20 years and the denominator as 24.5 years. Division of this fraction gives a quotient of .8163, which rounds to .82, or 82%.
8. Shirley Grose is entitled to one-half the 82% found to be marital, meaning Shirley Grose is entitled to 41% of the marital portion of the pension benefits to which Mr. Grose is entitled or received at any time after his 62nd birthday.
9. The plaintiff asserts she is entitled equitable distribution in all the subject disability pension payments received by the defendant after the date of his 62nd birthday.
10. The defendant moves the Court to dismiss plaintiff's petition, argues the Court's jurisdiction over this matter has lapsed due to vagueness of the language of the April 17, 1990 order, the plaintiff's failure to appeal therefrom, and the passage of time between that order and the date of the filing of plaintiff's petition. Defendant's motion to

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dismiss the petition is denied.

11. The defendant asserts the doctrine of laches precludes the plaintiff from taking any portion of the subject pension in that she has waited an unreasonably long time to assert her claim thereto. The plaintiff asserts the defendant cannot rely upon laches since she had no notice that the defendant was receiving a pension, that the defendant had knowledge of the order dated April 17, 1990 granting her a portion thereof and that it was the defendant's burden to notify plaintiff that he was receiving benefits which under the Court's order are her separate property.
12. The Court's order dated April 17, 1990 places no burden upon the defendant to notify the plaintiff of his receipt of retirement benefits.
13. The doctrine of laches precludes the plaintiff from recovering any portion of the retirement benefits paid to the defendant at any time prior to the date she filed her petition for accounting, the same having been filed on the 25th day of April, 2006.
14. From a review of the disability pension payment history of John H. Grose attached to the UMWA's letter dated January 25, 2007, the Court finds that between the date of the filing of the plaintiff's petition for accounting and the date hereof, the defendant has received a total of \$6,622.50

in disability pension payments. The plaintiff's 41% thereof is \$2,715.22.

Based upon the foregoing, the Court hereby ORDERS as follows:

1. The plaintiff is granted judgment against the defendant, John H. Grose, in the amount of \$2,715.22. The defendant is ORDERED to pay the said amount to the plaintiff within 30 days of the date of entry of this order.
2. Each party has moved the Court for an award of attorney fees, asserting they have substantially prevailed on the issues addressed hereinabove. The Court ORDERS that within 30 days of the date hereof, each party shall file a financial statement and a motion for attorney fees itemizing their respective claims therefore and their arguments in support thereof. Upon receipt of the same, the Court will rule upon the said motion without the need for further hearing.
3. The Court further ORDERS that until such time as a Qualified Domestic Relations Order dividing the plaintiff's portion of the pension payments is accepted and honored by the UMWA 1974 Pension Fund, the defendant shall, effective immediately, and within 48 hours of the receipt of all pension payments hereafter, immediately pay to Shirley E. Grose, 41% of all payments received by him from the Fund by

delivering the same in cash, money order, or certified check, to the offices of Harley E. Stollings, 710 Broad Street, Summersville, West Virginia 26651.

The parties' respective objections and exceptions to all adverse rulings are hereby acknowledged and reserved to them.

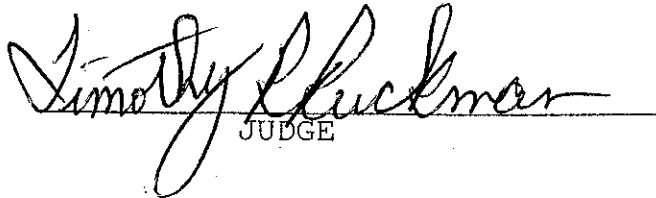
PARTIES - PLEASE TAKE NOTICE

- (1) This is a final order;
- (2) Any party aggrieved by a final order may take an appeal either to the Circuit Court or directly to the West Virginia Supreme Court of Appeals;
- (3) A petition for appeal to the Circuit Court may be filed by either party within thirty (30) days after entry of the final order;
- (4) In order to appeal directly to the West Virginia Supreme Court of Appeals both parties must file, within fourteen (14) days after entry of the final order, a joint notice of intent to appeal and waiver of right to appeal to Circuit Court.

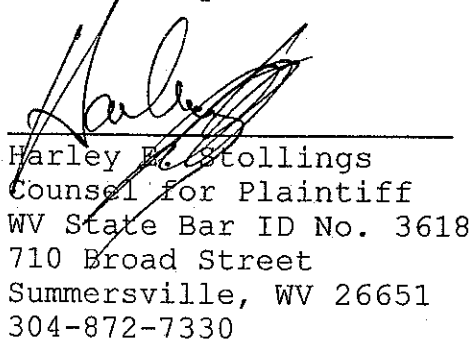
The Clerk of this Court is hereby directed to provide certified copies of this order to the plaintiff, Shirley E. Grose, at P. O. Box 773, Summersville, West Virginia 26651; to the defendant, John H. Grose, at 45 Grose Lane, Summersville, West Virginia 25551; to James Wilson Douglas, at 181 B Main

Street, Sutton, West Virginia 26601; and to Harley E. Stollings,
710 Broad Street, Summersville, West Virginia 26651.

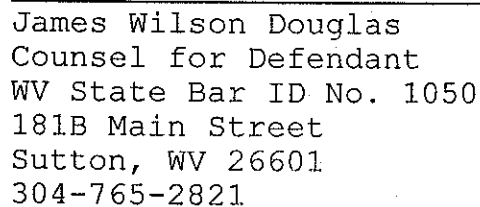
ENTERED this 5th day of June, 2007.

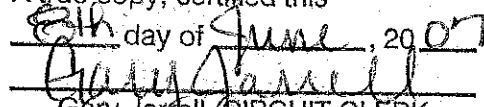

JUDGE

Prepared by:


Harley E. Stollings
Counsel for Plaintiff
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710 Broad Street
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304-872-7330

Approved by:


James Wilson Douglas
Counsel for Defendant
WV State Bar ID No. 1050
181B Main Street
Sutton, WV 26601
304-765-2821

A true copy, certified this
5th day of June, 2007

Gary Jarrell, CIRCUIT CLERK
Nicholas County Circuit Court
Summersville, WV 26651
By SM, Deputy